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Proof as to Publication and Acceptance of a Public Road.

The case of the Lynchburg Traction & Light Co. *v.* Guill, affirmed on June 13th, 1907, by the Court of Appeals at Wytheville, should call the attention of the profession to an important change in the law of evidence, which it seems to us should be made by the next General Assembly. The effect of that decision is that there can be no evidence admitted to show that a public highway was dedicated to and accepted by the county except record evidence. The court, quoting Perry *v.* McClung, 104 Va. 599, says that "the mere use of a road by the public for however long a time, would not constitute a public road; that the mere permission to the public by the owner of land to pass over the road upon it is more to be regarded as a license, and revocable at the pleasure of the owner; that a road dedicated to the public must be accepted by the County Court upon its records before it can be a public road." The court in the present case then says: "The acceptance of the dedication may in the case of streets be shown by the acts of corporation officers, but the acceptance of a road *in order to impose upon the public the burden of keeping it in order* (italics ours) must *appear as a matter of record,* though a formal acceptance is not necessary, and the law will be satisfied if it shall appear that the County Court had laid off the road before use into precincts, or appointed an overseer or surveyor for it, thereby claiming the road as a public one."

Now, while it may be strictly true that in order to impose upon the public the burden of keeping a road in order, record evidence should be necessary, why should this be necessary between other parties any more than the proof of the dedication of a public street. The case appealed was one for damages for an accident by a traction company, in which the plaintiff claimed

that the accident occurred upon a public highway, and failing this proof from record evidence, the plaintiff could not recover. The court held that the law was to be ascertained with respect not to the dedication and opening of the streets in a city, but to the establishment of public roads in the country; reaching the conclusion we have given above, that no parol evidence could be introduced to show that the road was a public highway. For our own part we cannot see any reason for the difference in the proof required as to public highways or city streets. It is usually much harder to prove the establishment of a public road than of a city street. The careless keeping of records, the vague descriptions, and the burning of many of our ancient records in the Commonwealth, make it in many counties almost, if not absolutely impossible to have any record locating definitely the line of any road; whilst in the cities there are nearly always maps and plans which show the streets.

Now if parol testimony could be introduced that from time immemorial a road had been used by the public and that the witnesses had seen the overseer of the roads working upon the same, either under the former law or under the present one, why should not this evidence be amply sufficient to prove the dedication and acceptance by the county? The question of dedication is a much more serious one than that of acceptance, and yet the court seems to lay stress upon the point of acceptance.

In nearly every other state in the Union the view is opposite to that taken by our court. Day *v.* Allender, 22 Md. 511; Ross *v.* Thompson, 78 Ind. 90; Harper *v.* Dodds, 3 Ill. App. 331; Com. *v.* Old Colony Ry. Co., 14 Gray (Mass.) 93; 22 Com. 107; Baldwin *v.* Herkle, 54: Iowa, 168. And cases can be cited from Pennsylvania, Texas, Michigan and California.

But as the law now stande in this State, only the General Assembly can alter it. It seems to us that this body should act and pass a law providing that parol testimony could be introduced to show that if a road had been used by the public—say for ten years—and that if during that time the road had been worked under the direction of the Superintendent of Roads of the county, then this should establish the fact that said road was a county road for all purposes in any suit at law or equity wherein it became necessary to show that the road was a public one.

Contempt of Court.

The case of Yoder *v.* Commonwealth, decided on June 13th at Wytheville (Va. Appeals 1, p. 204) is the first decision of the court upon subsection 3 of § 3768, Pollard's Code. It seems that one Yoder, styled by the court "a partisan in the cause of prohibition" in a publication written and issued by him in the city of Lynchburg, called *"The Idea,"* made an utterly unjustifiable, slanderous and outrageous attack upon Judge Frank P. Christian of the Corporation Court of that City in regard to his action in granting certain liquor licenses which did not seem to meet said Yoder's approval. Judge Christian issued a rule against him for contempt, fined him fifty dollars and directed his imprisonment for ten days. From this sentence he appealed and the Supreme Court reversed the judgment and discharged the prisoner. The section referred to is as follows, defining direct and indirect contempt: "Obscene, contemptuous, or insulting language addressed to a judge for or in respect of any act or proceeding had or to be had at any such court, or like language used in his presence and intended for his hearing, for or in any respect of such act or proceedings."

The court holds that the true construction of this subsection is that the language, whether spoken or written, must be *specifically addressed to the judge.* While admitting that this construction still leaves the judge, however innocent, at the mercy of slander and libel, even though false and however calculated to degrade the court and bring it into disrepute and contempt, yet the court holds the clause constitutional and leaves the judge no other remedy than that of an action at law for slander or libel.

This opinion seems to be in accord with Judge Holmes' opinion in Patterson *v.* Colorado, lately decided in the Supreme Court of the United States, though in that case the opinion seems to be merely *obiter,* the court dismissing the case on the ground that it had no jurisdiction. It seems that Patterson's newspaper criticized in vigorous terms the Supreme Court of Colorado for its decision in certain contested election cases, for which he was brought into court on proper proceedings and fined one thousand dollars and to stand in prison until the fine was paid. He ap-

pealed to the Supreme Court of the United States, which by a majority decision held that it was without jurisdiction; but in this case both Mr. Justice Holmes and Mr. Justice Harlan delivered strong opinions, the latter dissenting from the opinion of the majority that the court was without jurisdiction. Judge Holmes takes the ground that courts cannot complain of criticisms of their judgments after the case is decided and we suppose that no one will dispute this fact as long as the criticism is based upon truth and is decently and respectfully expressed. Judges cannot claim exemption from criticism by the press after their decisions are rendered. They should be held to a rigid responsibility, and a sober, calm, dispassionate criticism of their opinions and decisions should be invited, not condemned. But when the press lowers itself into contemptible blackguardism, and without any reason save that of malice or mere partisanship is allowed to attack a judge personally for his decisions in ill tempered and disrespectful language unwarranted by the facts, it is hard to see how an independent judiciary can be maintained if the power of the judge to punish such blackguardism and false and disrespectful language is destroyed. Such is the direct effect of the present statute as construed by the court and it seems to us that legislation is sadly needed to cure the law as it now stands. Any false, malicious, insulting or obscene remark made as to a judge in regard to his decisions by any one in the public press should take its place as if made to him or in his presence, intended for his hearing.

We might say here parenthetically that the language used by the court in the Yoder case is liable to be misconstrued. The court says: "That the language whether spoken or written, was to be *specifically addressed to the judge.*" The statute says "like language *used in his presence* and intended for his hearing." The court's language might very well be construed to mean that a man might speak to another person in the presence of the judge and use obscene, contemptuous or insulting language about the judge in respect to his decisions in court, and although the language was intended for his hearing and used in his hearing and presence, it would not be contempt if specifically addressed to some other person. We can hardly believe the court meant

to put this construction upon the plain language of the statute, but the sentence as it stands is, to say the least, ambiguous.

It is rather hard to reconcile the decision of the court in Yoder's Case with its decision in Burdett's Case, 103 Va. 838; and Carter's Case, 96 Va. 791. It is true the Constitution has been changed since the Carter Case was decided, but the reasoning of the court in that case seems to apply with as much force to the present state of the law, especially in view of the fact that it is admitted by the court in the Yoder Case that the Legislature had the power to "regulate" the right to punish for contempt previous to the Constitution. The power to "regulate" according to the decision in the Carter Case was in the Legislature prior to the Constitution, and the constitutional provision in view of the language used in that case, only conferred upon the Legislature a power which it then had. It seems to us, therefore that while the power should have been regulated by the Legislature, in the language of the Carter Case, "it cannot be destroyed or so far diminished as to be rendered ineffectual by legislative enactment. It is a power necessarily resident in and to be exercised by the court itself, and the Legislature cannot deprive said courts of the power to summarily punish for contempt by providing for a jury trial in such cases."

In the learned and carefully considered opinion of Judge Keith in this case, Judge Keith reviews the history of contempt and quotes with approval the language of the Supreme Court of Arkansas in State *v.* Morrill, 16 Ark. 390: "If the General Assembly may deprive the courts of power to punish one class of contempts, it may go the whole length and deprive them of power to punish any contempts." And likewise the language of the Supreme Court of West Virginia in State *v.* Frew, 24 W. Va. 477, speaking of the power of the courts to punish for contempt: "It is not given for the private advantage of the judges who sit in the court, but to preserve to them that respect and regard of which courts cannot be deprived and maintain their usefulness * * *. The confidence of the public in the judiciary should not be wantonly impaired."

And then in Judge Keith's own powerful language:

"In the courts created by the Constitution there is an inherent power of self-defense and self-preservation. This power may be

regulated, but cannot be destroyed or *so far diminished as to be rendered ineffectual by Legislative enactment.* (Italics ours.) It is a power necessarily resident in and to be exercised by the court itself and the vice of an act which seeks to deprive the court of this inherent power is not cured by providing for its exercise by the jury. While the Legislature has the power to regulate the jurisdiction of certain county and corporation courts, it cannot destroy, while it may confine within reasonable bounds, the authority necessary to the exercise of the jurisdiction conferred."

And again in Burdett's Case, 103 Va. 846, the same learned judge says:

"In the nature of things, why should not defamatory and scandalous criticisms upon a court or judge, with respect to an ended cause, be punished as contempt? It is true that it can no longer injure the particular litigant, but it degrades the administration of justice by bringing the courts and judges into disrepute.

'In Commonwealth *v.* Dandridge, already cited, the court said: 'Upon this part of the subject, and in reference to cases which have an indirect bearing on the present question, a distinction is attempted for which I can find neither reason nor authority. It is said that the attaching power may be exercised for contempts touching the prospective conduct of the judge, but not so far as to touch his past conduct. In reason I see but one pretense for this distinction. Threats and menaces of injury to a judge in case he shall render a certain judgment may be considered as impairing his independence and impartiality in the particular case to which the threats refer. And, if the power of punishment stop here, a curious consequence may ensue. A man may be attached for threatening to do that for which he could not be attached when actually done. One says of a judge, "if he render a certain judgment against me, I will insult or beat him." For this he may be attached. But if (the judgment having been rendered) this insult be actually offered, an attachment no longer lies, because the contempt is in relation to the past conduct of the judge, and to a case no longer pending. A recurrence to original principles—the only true test– by demonstrating that the weight, authority, and independence of the court may be equally assailed either way, will prove that this distinction is merely ideal.'

"We, therefore, conclude with the court in Morrill's Case that 'by common law, courts possess the power to punish, as for contempt, libelous publications, of the character of the one under consideration, upon their proceedings, pending or past, upon the ground that they tended to degrade the tribunals, destroy that

public confidence and respect for their judgments and decrees so essentially necessary to the good order and well being of society, and most effectually obstructed the free course of justice.'

"Nor do we think that the summary punishment as for contempt, of a newspaper article, constitutes an invasion of the liberty of the press. With respect to this feature of the case, it can, of course, make no difference whether the article refers to a pending or a past transaction."

And quoting State *v.* Morrill again, he says: "Any citizen has a right to comment upon the proceedings and decisions of a court, to discuss their correctness, and the fitness or unfitness of the judges for their stations, and the fidelity with which they perform the important trusts reposed in them; but he has no right to attempt, by libelous publications, to degrade the tribunal, for such publications are an abuse of the liberty of the press, for which he is responsible." In this statement of the law we heartily concur. State *v.* Shepherd, supra.*

In view of these utterances, the truth and forcefulness of which cannot be questioned, it is hard to see how the court in Yoder's Case could have reached the conclusion that "the omission in the act regulating contempts to provide for the punishment of such offenses—i. e., false and slanderous publications reflecting on a judge in regard, etc.—is so unreasonable or so far abridges, diminishes and impairs the rigor and efficiency of the courts as to render it unconstitutional."

If this decision is to remain in force unchanged by Legislative action, then the position of a judge is one shorn of much of its dignity, and powerless to defend itself against slander, malice and unjustifiable assault and contumely. We cannot believe the law-making power of this State contemplated such a result.

But in addition to this it seems to us a very dangerous encroachment of the Legislature upon the Judicial function, if the former can say what constitutes contempt. If it can limit it in one set of cases, why not in all? If the Legislature is to determine what is a direct or what an indirect contempt, is it not passing upon a judicial question? It has the constitutional power "to *regulate* the exercise by courts of the right to punish for contempt," but does this give it a right to say what is, or what is not, contempt? If it has this right, then can it not say "that no

*Burdett's Case was decided after the present Constitution had gone into effect, but before the addition of subsection 3 to § 3768, Pollard's Code.

language shall constitute contempt of court?" It may regulate the exercise by the courts of this right—that is to say, pass reasonable regulations as to the punishment of contempt, but to deprive the courts of the power invested in them to protect themselves from malicious, false and slanderous charges, is to strike one of the deadliest blows at justice and an independent judiciary. "It is in vain," then, as has well said Chief Justice Holt, "that the law has the right to act, if there be a power above the law which it has the right to resist; the law would then be but the right of anarchy and power of contention."

Paternalism.

The desire of many so called reformers to have the law-making power regulate every conceivable evil under the sun has of late received several setbacks from the courts. The highest court in New York has lately, in the case of State *v.* Williams held unconstitutional the State law prohibiting the employment of women in factories during certain night hours. Judge Gray in his opinion says: "The right of the State to restrict or regulate the labor and employment of children is unquestionable; but an adult female is not to be regarded as a ward of the State, or in any other light than the man is regarded when the question relates to the business pursuit or calling. In the gradual course of legislation upon the rights of woman, in this State she has come to possess all the responsibilities of the man, and she is entitled to be placed on an equality of rights with the man. Considerations of her physical differences are sentimental and find no proper place in the discussion of the constitutionality of the act."

The logic of this opinion would be irresistible but for the statement that in the State woman has in the gradual course of Legislation come to possess all the responsibilities of man and is entitled to be placed on an equality of rights with the man. This is not correct, for until the woman has the ballot she does not possess all the responsibilities and rights of man. God forefend the day when she shall have this last responsibility.

At the same time the decision is based upon sound principles and is in line with the decisions which hold that the State has no right to interfere with the liberty of contract between persons *sui juris*.